

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HOWARD CROSBY and OMAR FATTAH,

NO. CV-09-5055-EFS

Plaintiffs,

V.

ORDER GRANTING AND DENYING IN
PART PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

PETROMED, INC., a Nevada corporation; PETROMED, LTD., a Canadian corporation; PETROMED, PLC (a/k/a/ PETRMOED, PLC-UK), a United Kingdom corporation; PETROMED CORPORATION, a Belize corporation; HAGAI AMIR and JANE DOE AMIR, husband and wife d/b/a ABBERLEY INTERNATIONAL, LTD.; RUSSELL KOCH and JANE DOE KOCH, husband and wife, d/b/a ATLANTIQUE CAPITAL GROUP and BOSWELL SYSTEMS CORPORATIONS; PETROMED CONSORTIUM CORPORATION OF THE BAHAMAS, a Bahamian corporation; LYLE DURHAM and DEBORAH L. DURHAM, husband and wife; THOMAS J. HARRIS, CPA, and JANE DOE HARRIS, husband and wife; JOHN DOES 1 THROUGH 50, INCLUSIVE.

Defendants.

1 A hearing was held in the above-entitled matter on September 2-3,
2 2009 in Richland. Before the Court was Plaintiffs' Motion for
3 Preliminary Injunction. (Ct. Rec. 6.) Melody D. Farance and Michael H.
4 Church appeared on behalf of Plaintiffs. J. Jarrette Sandlin appeared
5 on behalf of the individual Defendants and John J. Tollefson appeared on
6 behalf of the corporate Defendants.

7 Plaintiffs seek an injunction that does three things:

- 8 1) prevents Defendants from transferring, secreting, dissipating,
9 or selling any assets to any Defendant or to any third-party
10 individual or entity;
- 11 2) prevents Defendants from destroying books, records, accounts,
12 ledgers, computer drives and files, or any other documentation
13 identifying assets; and
- 14 3) orders Defendants to return certain assets to the proper entity
15 or entities. (Ct. Rec. 6 at 2.)

16 This Court previously granted Plaintiffs' *Ex Parte* Motion for an
17 Immediate Temporary Restraining Order (Ct. Rec. 2) enjoining the conduct
18 described in 1) and 2). (Ct. Rec. 15.)

19 After reviewing the submitted materials and relevant authority, the
20 Court is fully informed and grants and denies in part Plaintiffs' motion.

21 **I. Background**

22 This case arises out of an investment Defendants solicited from
23 Plaintiffs in PetroMed, Inc. (hereafter "Inc."). Inc. was originally a
24 Nevada corporation owned by the Kern family. At some point, the Kern
25 family let this name lapse. In November 2000, Defendants incorporated
26 a company called Kelsey Environmental Technologies (hereafter "Kelsey").

1 In July 2003, Kelsey changed its name to PetroMed, Inc. Incorporated by
2 Defendants Amir, Koch, and Durham, Inc. was a startup to explore oil and
3 gas off the Israeli coast. This corporation was terminated by
4 administrative action of the state of Nevada on December 1, 2003, and the
5 name PetroMed, Inc. now belongs once again to the Kern family and is
6 unrelated to Defendants.

7 In 2006, Defendants began to apply for exploratory permits from the
8 Israeli government. These permits grant the right to perform exploratory
9 tests for oil in a certain territory in the sea, and also the right to
10 obtain drilling licenses in the future. Defendants applied for the
11 permits in Inc.'s name. The exploratory permits are issued by the
12 Israeli Ministry of Infrastructure. Permits last for 18 months, after
13 which they expire. Parties with permits must perform certain seismic
14 tests in order to receive drilling licenses from the Ministry. These
15 permits and the subsequently-acquired licenses are the only significant
16 asset of any of the Defendants.

17 On December 30, 2005, Defendants created PetroMed Ltd. (hereafter
18 "Ltd."), a Canadian corporation with its headquarters in Toronto.
19 Initially, Defendants believed they would list Ltd. on the Toronto Stock
20 Exchange to raise the necessary funds for the seismic studies. All of
21 the assets and shares of Inc. were transferred to Ltd. Thus, the
22 exploratory permits, which had been applied for in Inc.'s name and using
23 Inc.'s funds, were issued to Ltd.

24 Subsequently, Defendants were convinced that they could raise more
25 money if they listed on the Frankfurt Stock Exchange. In order to be
26 able to list on the Frankfurt Stock Exchange, Ltd. transferred all its

1 assets to PetroMed PLC (hereafter "PLC"), a UK corporation created on
2 June 3, 2006. PLC was listed on the Frankfurt Stock Exchange, but it had
3 only small trading volume.

4 After it was discovered that the London-based promoter who helped
5 list PLC on the Frankfurt Stock Exchange had taken 2 million shares for
6 himself, PLC performed a 50:1 reverse stock split in order to prevent the
7 promoter from profiting from his malfeasance and diminishing the stock's
8 value. This reverse split, coupled with the issuance of three (3)
9 million additional shares to Mecklin and Palm Capital, allegedly resulted
10 in a dilution of shareholder value of 69.75%. Additionally, PLC
11 redomiciled in Belize and changed its name to PetroMed Corp. (hereafter
12 "Corp."), which was created July 9, 2007. The move to Belize was
13 ostensibly prompted by fears of a lawsuit in British courts by the
14 promoter against PLC. The assets from the original Inc. are all now in
15 Corp.

16 In February 2007, PLC was supposed to begin a joint venture with
17 Altmark whereby Altmark would issue bonds to raise funds for drilling in
18 exchange for the rights to drill 160 square kilometers of PLC's total
19 3600 square kilometers. This deal never materialized because the funds
20 were never raised. In preparation for this deal, Defendants created
21 PetroMed Consortium (hereafter "Consortium") on April 10, 2005.
22 Consortium was domiciled in the Bahamas. The alleged purpose of
23 Consortium was to protect the shareholders of PLC from liability if
24 something went wrong with the bonds. The parties dispute whether
25 Defendants ever transferred any corporate assets to Consortium, though
26

1 it appears that none were transferred because Altmark failed to raise
2 funds.

3 On July 15, 2008, the Israeli Ministry of Infrastructure Corp.
4 Issued to Corp. two (2) drilling licenses for the same territories for
5 which Corp. acquired exploratory permits in 2006, after the exploratory
6 permits expired. These licenses last for three (3) years, and can be
7 renewed for an additional four (4), for a total of seven (7) years. At
8 the same time, Corp. also obtained a new exploratory permit. Presently,
9 Corp. is in negotiations with Delek, an Israeli oil company, to create
10 a joint venture whereby Corp. would transfer some portion of the rights
11 to the licenses and permit in exchange for assistance with further
12 exploration and drilling. The explorations are expected to cost a total
13 of fourteen million dollars, which Corp. lacks. Corp. also allegedly
14 obtained a ship from WesternGeco in order to perform the seismic 2-d
15 studies in the territory for which they acquired the new exploratory
16 permit, so that Corp. may eventually obtain a drilling license for this
17 territory. Corp. has not yet paid WesternGeco or given any security for
18 payment for these studies, though there reportedly is a lengthy agreement
19 with WesternGeco not yet produced by Defendants.

20 Plaintiff Crosby bought all his stock in Inc. in February 2004.
21 Plaintiff Fattah first bought stock in Ltd. in 2006, after it was listed
22 on the Frankfurt Stock Exchange, and continued to buy stock in Ltd. and
23 PLC until 2008.

24 Plaintiffs filed their Complaint (Ct. Rec. 1) on July 7, 2009. Soon
25 after, Plaintiffs moved *ex parte* for a Temporary Restraining Order (Ct.
26

1 Rec. 2), which the Court granted. (Ct. Rec. 15). That Order expired on
2 September 3, 2009.

3 **II. Discussion**

4 **A. Preliminary Injunction Standard**

5 "A plaintiff seeking a preliminary injunction must establish that
6 1) he is likely to succeed on the merits, 2) he is likely to suffer
7 irreparable harm in the absence of preliminary relief, 3) the balance of
8 equities tips in his favor, and 4) an injunction is in the public
9 interest." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d
10 1046, 1052 (9th Cir. 2009). "A preliminary injunction is not a
11 preliminary adjudication on the merits: it is an equitable device for
12 preserving the status quo and preventing the irreparable loss of rights
13 before judgment." *Textile Unlimited, Inc. v. A..BMH and Co., Inc.*, 240
14 F.3d 781, 786 (9th Cir. 2001) (citing *Los Angeles Mem'l Coliseum Comm'n*
15 v. *Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980)). The
16 decision to grant or deny a preliminary injunction is in the district
17 court's discretion. *Santa Barbara County v. Hickel*, 426 F.2d 164, 168
18 (9th Cir. 1970), cert. denied, 400 U.S. 999 (1971).

19 **B. Analysis**

20 **1. Likelihood Irreparable Injury**

21 Plaintiffs argue that they have shown that they are likely to
22 suffer an irreparable injury because Defendants have transferred assets
23 among their various corporate entities so many times that they are likely
24 to do it again in the future. Alleging the previous actions diluted the
25 value of Plaintiffs' shares, Plaintiffs are concerned they will recover
26 nothing in the event they prevail in this lawsuit.

1 The Court finds that Plaintiffs have not demonstrated a likelihood
2 of irreparable harm. First, the majority of what Plaintiff Fattah seeks
3 by this injunction is information that would be provided in the ordinary
4 course of discovery. Plaintiffs want to find out which of the corporate
5 Defendants own which assets. They claim this is necessary because assets
6 and identities have shifted so many times and the stock was delisted from
7 the Frankfurt exchange, so investors no longer know whose stock they own
8 or what it is worth. This may all be true, but it is all information
9 that Defendants will be required to disclose later in litigation.

10 Plaintiffs also ask the court to enjoin *all* transfers, not just
11 transfers to corporate entities owned by the individual Defendants.
12 Sophisticated investors such as Plaintiffs know when they buy their
13 shares in a startup that the startup itself has no money. Investors
14 provide the funds in the hope that their financial assistance will carry
15 the startup's idea to fruition and provide a return. Virtually all the
16 money invested in Corp. and its previous iterations has been spent,
17 allegedly in the preliminary phases of exploration, and Corp. has no
18 cash. As Plaintiffs recognize, the only significant asset Defendants
19 currently have are the two drilling licenses and one exploratory permit.
20 But even these assets are worthless unless a deal can be struck by Corp.
21 with some other entity that has either the equipment to perform the
22 seismic studies and the drilling or the funds to pay an oil-exploration
23 company to perform them. Only in this way will they ultimately be able
24 to drill for oil and gas and make a profit for the investors.

25 In other words, the only way Corp. can make any profit and
26 Plaintiffs can recover from this suit is if it raises all the necessary

1 funds from investors or enters into agreements that may result in a
2 transfer of some interest in the permit and licenses to a third party.
3 But this is precisely what Plaintiffs ask the Court to forbid Defendants
4 from doing by this injunction. The Court declines to do so. There is
5 at least an equal likelihood that to do so would inflict irreparable harm
6 on the parties. Therefore, the Court finds that the Plaintiffs have
7 failed to prove there is a likelihood of irreparable injury if the Court
8 fails to enjoin Defendants.

9 **2. Likelihood of Success on the Merits**

10 The Court finds also that Plaintiffs' probability of success on the
11 merits is in doubt. To begin, Plaintiff Crosby bought all his stock in
12 the corporate Defendants in February 2004. This suit was not filed until
13 July 2009. Claims under the Securities Exchange Act must be brought
14 within either five years of the violation or two years of the discovery
15 of the facts constituting the violation. *See* 28 U.S.C. § 1658(b).
16 Because Crosby did not plead the date he discovered the facts that
17 constitute the alleged violation, it is possible that Crosby's Federal
18 claim will be dismissed because he lacks standing under the statute of
19 repose.

20 Fattah bought his shares from 2006-2008, and so he does not face
21 the statute-of-limitations problem. Nevertheless, Fattah faces other
22 obstacles. The elements of a securities-fraud claim under § 10(b) are

23 1) material misrepresentation or omission;
24 2) scienter;
25 3) connection to buying or selling a security;
26 4) reliance on the misrepresentation or omission;

1 5) economic loss; and

2 6) a causal connection between the misrepresentation or omission
3 and the loss. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42
4 (2005).

5 The essence of Fattah's securities-fraud claim is that he was not
6 informed that the exploratory permits would expire within eighteen (18)
7 months. Fattah's allegations that he put money into an account in Inc.'s
8 name to buy Ltd. stock cannot be a basis for his claim because this
9 occurred after he began to buy stock in 2006, and so he could not have
10 relied on such misrepresentations.

11 Although it may be true that Fattah was not informed that the
12 permits would last only eighteen (18) months, this information was
13 publicly available in English on the Israeli Ministry of National
14 Infrastructure's website. In this circuit, a plaintiff in a securities-
15 fraud case must justifiably rely on an omission in order to maintain a
16 claim. See *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151,
17 1159 (9th Cir. 1996). A prudent investor could have investigated the
18 site and discovered that the permits would expire in eighteen (18)
19 months. On the current record, the Court cannot say that it is clear
20 that Fattah justifiably relied on any omission.

21 Plaintiffs have a total of seventeen (17) other causes of action
22 alleged in their Complaint, but these are all state claims over which
23 this Court does not have jurisdiction absent pendent jurisdiction, which
24 requires one Federal claim. See 28 U.S.C. §§ 1331, 1332, 1337, 1367.

25 Because the Court has found that Plaintiffs have demonstrated
26 neither a likelihood of irreparable injury nor a likelihood of success

1 on the merits, it is sufficient to say that on this record the equities
2 are equally balanced and the public interest would not be served by
3 enjoining further acts of this venture.

4 **C. Conclusion**

5 Accordingly, Plaintiffs' Motion is denied insofar as it requests
6 an injunction that includes elements 1) and 3) of their motion: stopping
7 the transfer of assets and requiring Defendants to return the permits and
8 licenses to the proper entity.

9 The parties agreed in court, however, that element 2) of
10 Plaintiffs' Motion is acceptable to all. Defendants asserted that the
11 financial records and other documents identifying the location of assets
12 will assist their defense, and so they are as interested in preserving
13 these documents as Plaintiffs are. The parties stipulated to an
14 agreement only with regard to destroying books, records, accounts,
15 ledgers, computer drives and files, external drives, backup tapes, and
16 server contents, and any other documentation identifying assets, and the
17 Court enters this agreement as part of this Order.

18 For the reasons given above, **IT IS HEREBY ORDERED:**

19 1. Plaintiffs' Motion for Preliminary Injunction (**Ct. Rec. 6**) is
20 **GRANTED AND DENIED IN PART.**

21 2. Pursuant to the parties' oral agreement in Court, Defendants
22 are restrained from destroying books, records, accounts, ledgers,
23 computer drives and files, external drives, backup tapes, and server
24 contents, or any other documentation identifying assets.

25 3. The remainder of Plaintiffs' Motion for Preliminary Injunction
26 is **DENIED**.

4. The Clerk of the Court shall not release the bond posted for the Temporary Restraining Order for thirty (30) days from this date to allow Defendants an opportunity to engage in motions practice.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide a copy to counsel.

DATED this 4th day of September 2009.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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